QUESTION PRESENTED

Whether an employer-member of a multiemployer bargaining unit, who has given written authority to the multiemployer association to represent the employer for "all matters contained in or pertaining to the current approved labor agreement", and also binds itself to comply with "all of the terms and conditions of employment contained in the [current approved agreement] and all approved amendments thereto", can avail itself of all the benefits flowing from that agreement and amendments thereto, but repudiate any provision of the agreement or amendments thereto that is a "permissive" rather than a "mandatory" subject of bargaining under Act.

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No. 81-2211

IN THE

Supreme Court of the United States

October Term 1981

DEAN J. McDONALD, as Collection Agent
for the Trustees of the
National Electrical Industry Fund
Petitioner

v.

HAMILTON ELECTRIC, INC. of FLORIDA
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 666 F.2d 509 and is set forth in the Appendix to the petition for writ of certiorari filed by Petitioner. Pet. App. 1 (a)-9(a). The Court's denial of the Petitioner's petition for rehearing on March 3, 1982 is also set forth in the Appendix to the petition for writ of certiorari filed by Petitioner. Pet. App. p. 18(a). The decision of the District Court also appears in the Appendix submitted by Petitioner. Pet. App. pp. 10a-17a.

JURISDICTION

The jurisdictional basis for this Court's review of the decision of the Court of Appeals for the Eleventh Circuit is described in the petition for certiorari.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29.
Section 185(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 158(a) It shall be an unfair labor practice for an employer -

***

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).[1]

STATEMENT OF THE CASE

Respondent, Hamilton Electric, Inc. of Florida (Hamilton) is a Florida corporation engaged in electrical contracting. Although Hamilton hires labor from the local unions of the International Brotherhood of Electrical Workers (IBEW), Hamilton has never been an express party to a collective bargaining agreement with the IBEW local unions.

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[1]Petitioner cites Section 8(a)(5) of the Labor-Management Relations Act, 29 U.S.C. 158(a)(5) as a statutory provision involved. This case was not brought under §8(a)(5) of the LMRA, 29 U.S.C. 158(a)(5) but rather arose under §301 of the LMRA, 29 U.S.C. 185(a). The refusal by Respondent to pay into the National Electrical Industry Fund (NEIF) was not a violation of 29 U.S.C. 158(a)(5) since Respondent never assented to, agreed, or operated under any collective bargaining agreement which included the NEIF.

The Florida West Coast Chapter of the National Electrical Contractor's Association (FWCC, NECA) is party to various collective bargaining agreements with separate local unions of the International Brotherhood of Electrical Workers (IBEW). The FWCC, NECA and the IBEW locals negotiate collective bargaining agreements for the geographic area of the particular IBEW local establishing wages, hours and terms and conditions of employment for employees covered by the local IBEW labor agreement.

Employers who are not members of the FWCC or NECA become bound to the local IBEW agreements by executing short-form agreements (Letters of Assent).[2] By executing Letters of Assent, non-member employers agree to adhere to the terms and conditions of the current collective bargaining agreements between the locals of the IBEW and the FWCC, NECA and authorize the FWCC, NECA to negotiate matters pertaining to or amending the agreements. Hamilton is not and never has been a member of the FWCC or NECA. For many years Hamilton has operated under the working conditions established by the IBEW local agreements and has utilized union labor from the IBEW. Hamilton first became obligated in writing to local IBEW agreements in 1974 and 1976. Hamilton's obligation to the IBEW agreements in 1974 and 1976 was derived from the Letters of Assent (A and B).

LETTERS OF ASSENT

Individual electrical contractors who are not members of FWCC or NECA, such as Hamilton, are required to sign Letters of Assent in order to utilize IBEW labor in the geographic jurisdiction of the particular IBEW local.

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[2]Letters of Assent (A and B) are IBEW local union forms which are routinely submitted by IBEW locals to contractors, who are not members of NECA, requesting union labor (Res. App. pp. 1a-2a are a reproduction of Letters of Assent A and B executed by Respondent in 1974 and 1976 respectively which were introduced at trial as Defendant's Exhibits 19 and 7).

There are two types of Letters of Assent: Type "A" authorizes the FWCC, NECA to act as the signatory's collective bargaining agent for all matters contained in the current approved labor agreement between FWCC, NECA and the IBEW local. Letter of Assent A specifically limits the obligation of the signatory employer to "all matters contained in or pertaining to the current approved labor agreement" between the FWCC and the IBEW local (Res. App. p. 1a). Letter of Assent A can be terminated by the signatory employer only by giving written notice of termination to the FWCC and the particular local union at least 150 days prior to the anniversary date of the then current labor agreement.[3] An employer signing a Letter of Assent A is considered a member of the NECA chapter bargaining unit.

The Letter of Assent B binds the signatory employer to the terms of the local IBEW-NECA collective bargaining agreement and all approved amendments to the terms of the local agreement but does not make the signatory employer part of the bargaining unit. Letter of Assent B specifically obligates the employer "to comply with all of the terms and conditions of employment contained in the [current approved agreement] and all approved amendments thereto." (Res. App. p. 2a). Although Letter of Assent B is similarly specific concerning the obligations of the signatory employer, Letter of Assent B, unlike A, provides for a specific termination date and automatically renews itself unless 60 days notice of intent not to renew is given.

Hamilton became obligated to "all matters contained in or pertaining to the current approved Inside and Residential labor agreements between the FWCC and Local Union 915, IBEW"

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[3]Hamilton never submitted a 150 day notice to terminate and had no reason to do so. Hamilton was satisfied with operating pursuant to "all matters contained in or pertaining to the current approved labor agreement" which agreement did not contain the National Electrical Industry Fund (NEIF) during the pertinent time period (Respondent Appendix pgs. 3a-23a are a reproduction of one of the assented-to agreements which was introduced at trial as Defendant's Exhibit 22 effective from December 1, 1976 to November 30, 1977.)

through execution of Letters of Assent A in 1974 (Res. App. p. 1a). Hamilton was required to sign a Letter of Assent B for IBEW Local Union 941 in November, 1976 for the 1976 labor agreement with Local Union 941. The Letter of Assent B binded Hamilton to "all of the terms and conditions of employment contained in the above-mentioned agreement and all approved amendments thereto" (Res. App. p. 2a).[4] Hamilton also executed a Letter of Assent B in 1976 for Local Union 308, IBEW. None of the collective bargaining agreements to which Hamilton assented in 1974 and 1976 contained the National Electrical Industry Fund provision (Res. App. pp. 3a-23a).

Subsequent to the execution of the Letters of Assent by Hamilton and while they were still in effect, NECA and the IBEW in 1976 negotiated changes and amendments to provisions contained in, pertaining to, or related to the IBEW labor agreements which Hamilton had previously assented to (increase in employee pension benefits (NEBF); management rights; shift work; and apprentice ratios). At the same time, NECA and the IBEW created the National Electrical Industry Fund (NEIF) which required electrical contractors who were not members of NECA to contribute 1% of their gross payroll to an industry fund for the purpose of financing FWCC and NECA activities.

THE 1% NATIONAL ELECTRICAL INDUSTRY FUND

The 1% NEIF was established on the national level by the National Organization of NECA and the IBEW in 1976 to become effective July 1, 1977. Along with the establishment of the NEIF in 1976, three amendments to the IBEW-NECA agreements were negotiated nationally and subsequently adopted in local IBEW agreements. The three amendments, unlike the NEIF, supplemented and pertained to provisions con-

[4]Hamilton had first signed a Letter of Assent B with Local Union 941 in 1974 and was then required to execute additional separate Letters of Assent B for both 1975 and 1976 labor agreements with Local Union 941, IBEW.

tained in prior local IBEW agreements - increase in contributions to pension fund (NEBF); management rights; shift work; and apprentice ratios.

The only funds included in the local IBEW labor agreements assented to by Hamilton were funds for the benefit of the employees (health and welfare; employee pensions (NEBF); employee vacation funds; and apprenticeship and training funds). The NEIF, although denominated an industry promotion fund, is a membership fee charged to electrical contractors who are members of the FWCC, NECA, and this charge is also assessed against non-member contractors such as Hamilton who utilize IBEW labor. Hamilton is not and never has been a member of the FWCC or NECA. Hamilton has never paid into the NEIF. When Hamilton first learned of such a payment through a NECA-GRAM (Res. App. p. 24a), he was operating under assented-to labor agreements which did not include any such fund. Hamilton immediately communicated to the Petitioner and the FWCC his objections to the NEIF.[9] On March 7, 1977, Hamilton received copies of the modified collective bargaining agreements and immediately sent letters to all IBEW locals stating that he would not contribute to the NEIF, was not a member of NECA and would not become a member.

THE ELEVENTH CIRCUIT DECISION

The U.S. Court of Appeals for the Eleventh Circuit reversed the judgment of the District Court which held that the Letters of Assent signed by Hamilton in 1974 and 1976 obligated Hamilton to the 1% NEIF. The Eleventh Circuit disagreed with the conclusions of the District Court and the grounds upon which the District Court's decision was based. The District Court held first that Hamilton authorized FWCC, NECA to

[9]The October, 1976 NECA-GRAM (Res. App. p. 24a) did not refer to any agreement that the NEIF would be incorporated into but rather referred to a "new agreement". The new agreement, never assented to by Hamilton, is reproduced in Petitioner's Appendix at pages 19a-30a.

bind it to the NEIF adopted in July, 1977 by executing Letters of Assent which obligated Hamilton to collective bargaining agreements in 1974 and 1976. The District Court, without focusing on the precise language in the Letters of Assent which frames the obligation of Hamilton, concluded that the Letters of Assent binded Hamilton to the collective bargaining agreements which included the 1% NEIF and granted the FWCC, NECA plenary authority to bind Hamilton to the NEIF. Additionally, the District Court concluded that Hamilton was obligated to pay into the NEIF on the basis of acceptance and ratification of local IBEW agreements that did not include the NEIF.

The Eleventh Circuit analyzed the language of the Letters of Assent in conjunction with the collective bargaining agreements referred to in the Letters of Assent in determining whether Hamilton was obligated to the NEIF (Pet. App. pp. 4a-6a). After interpreting the plain wording in the applicable clauses of the Letters of Assent and the collective bargaining agreements assented to by Hamilton, the Court concluded that the NEIF fell beyond the scope of the Letters of Assent and authority given FWCC, NECA by the Letters of Assent (Pet. App. pp. 5a-6a). The Court's conclusion was premised on the fact that none of the collective bargaining agreements to which Hamilton assented in 1974 and 1976 contained an NEIF provision and that Hamilton agreed, through execution of the Letters of Assent, to be bound by any matter contained in the extant collective bargaining agreements as well as any changes negotiated by the FWCC, NECA which pertained to or amended the agreements assented to (Pet. App. pp. 5a-6a).

The Court, following the plain meaning of the clauses in the Letters of Assent, concluded that the Letters of Assent executed by Hamilton specifically limited the authority of FWCC, NECA as bargaining representative to "those matters contained in, pertaining to, or amending the 'current' labor agreement" (Pet. App. p. 6a note 6). Although the Court analyzed that Article II in the collective bargaining agreements assented to "generally"

limited the scope of the agreements to mandatory subjects of bargaining, the Court recognized that "permissive" as well as "mandatory" subjects could be assented to (Pet. App. p. 6a). Further, the Court acknowledged that if the NEIF had pertained to or amended the assented-to collective bargaining agreements then Hamilton would be bound to that provision (Pet. App. pp. 5a-6a).

Although the Court addressed the question of whether an "industry promotion fund" is a mandatory or permissive subject of bargaining (Pet. App. p. 7a), the essential thrust of the Court's decision concerning Hamilton's obligation to the NEIF is the fact that the NEIF does not pertain to or amend any term or provision contained in the assented-to collective bargaining agreements.[8] The Court did not conclude as Petitioner suggests that Hamilton was not bound to the NEIF simply because an industry promotion fund is a permissive rather than a mandatory subject of bargaining.

The Eleventh Circuit also concluded that Hamilton did not ratify the NEIF provision or the collective bargaining agreements containing the NEIF provision by continuing to follow and adhere to the terms and provisions of the collective bargaining agreements which Hamilton had previously assented.

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[8]Permissive subjects of bargaining such as interest arbitration (Art. I, Res. App. p. 1a); internal union discipline (Art. II, Sec. 6, Res. App. p. 8a); and scope of the bargaining unit (Art. II, Sec. 3, Res. App. p. 6a) were included in the assented-to agreements and in agreements prior thereto. Therefore, they were "permissive" provisions, unlike the NEIF, which were "contained in" or "pertained to" the assented-to collective bargaining agreements within the specific language of the Letters of Assent. The Letters of Assent authorized the FWCC, NECA to bind Hamilton to terms and provisions pertaining to or amending the assented-to collective bargaining agreements. The July, 1977 provisions which pertained to or amended terms and provisions contained in the assented-to collective bargaining agreements fell within the scope of the Letters of Assent. Unlike the NEIF, Article II, Employer Rights - Union Rights (Res. App. p. 5a); Article III, Sec. 2(b) - Shift Work (Res. App. p. 9a); Ratio of Apprentices to Journeymen in Article VI, Sec. 6 (Res. App. p. 20a); and Pension Fund (NEBF) Benefits in Article II, Sec. 5(b) (Res. App. p. 6a) were provisions already contained in the assented-to collective bargaining agreements (Res. App. pp. 3a-23a).

Additionally, the Court concluded that since Hamilton expressly rejected and never contributed to the NEIF there was no ratification of the provision.

REASONS FOR DENYING THE WRIT

I.

General Observations

The fundamental assertion of Petitioner - that a party who is a bound to a multi-employer collective bargaining agreement cannot repudiate any provision of the agreement that is a "permissive" rather than "mandatory" subject of bargaining - is correct. No doubt, as Petitioner argues, the stability of multi-employer bargaining would be upset if parties were allowed to reject permissive subjects of bargaining previously agreed to. Petitioner's argument incorrectly presupposes that Respondent, by executing Letters of Assent in 1974 and 1976, granted plenary authority to FWCC, NECA to act as its collective bargaining representative, that the NEIF falls within the language of the Letters of Assent, and that the modified agreements containing the NEIF are the same agreements Respondent assented to.

Petitioner's argument is predicated on the Letters of Assent authorizing FWCC, NECA to negotiate or adopt the NEIF provision regardless of the fact that the Letters of Assent specifically limit that authority to provisions and terms "pertaining to", "contained in" or "amending" the assented-to collective bargaining agreements. Also, the fact that the NEIF was not included in any collective bargaining agreement assented to by Hamilton is ignored.

The reversal of the judgment entered by the District Court is predicated on errors found by the Eleventh Circuit which are not addressed in the Petition. The Eleventh Circuit held that by the execution of the Letters of Assent, Respondent "agreed to

be bound by any matter contained in the extant collective bargaining agreements as well as any changes negotiated by the FWCC, NECA pertaining to or amending the agreements" (Pet. App. p. 5a). Since none of the collective bargaining agreements to which Hamilton expressly assented contained an NEIF provision and the NEIF did not pertain to or amend any term or provision in the assented-to agreements, the Court concluded that Respondent "could not be bound by the adoption of a permissive subject of bargaining not provided for by the assented-to labor agreements" (Pet. App. p. 6a). The Eleventh Circuit decision was correctly based on the interpretation and construction of the wording in the Letters of Assent and the collective bargaining agreements referred to in the Letters of Assent.

Although the Eleventh Circuit for the first time addressed the question of whether an "industry promotion fund" was a permissive or mandatory subject of bargaining, the Court did not conclude that an employer who assents to a collective bargaining agreement through the execution of Letters of Assent can repudiate any provision or amendments to provisions of the assented-to agreements that are "permissive" rather than "mandatory" subjects of bargaining. In fact, the Court recognized that when permissive subjects of bargaining are included in, pertain to, or amend the assented-to labor agreements, the assenting employer could be obligated to the permissive provisions, even an industry fund provision.

> Thus only if the NEIF provision *pertained to* or *amended* the assented-to collective bargaining agreements can we conclude that the appellant authorized the appellee to bind it to the NEIF provision. (Pet. App. pp. 5a-6a)
>
> ***
>
> That is not to say that the FWCC, NECA and Local Unions could not have adopted a permissive subject of bargaining and that the appellant could not have expressly assented to or ratified such a provision. In the absence of

> subsequent assent or ratification, however, the appellant could not be bound by the adoption of a permissive subject of bargaining not provided for by the assented-to labor agreement. (Pet. App. p. 6a).

Neither the holding of the Eleventh Circuit concerning the interpretation and construction of the Letters of Assent nor the Court's conclusion regarding ratification is premised on the NEIF qualifying as a "permissive" rather than "mandatory" subject of bargaining.

The Petitioner asks this Court to consider whether an employer who has agreed to become bound to a multi-employer collective bargaining agreement can then repudiate any provision of the agreement or amendment thereto which is a "permissive" rather than a "mandatory" subject of bargaining. Whether or not this question is appropriate for this Court's consideration, the present case is not a suitable vehicle. Although the Court concluded that under Article II of the collective bargaining agreements assented to, the scope of the agreements was "generally" limited to mandatory subjects of bargaining, citing *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958) (Pet. App. p. 6a), the Court's decision did not hold that any "permissive" provision could be repudiated (Pet. App. p. 6a).

II

The Decision Below Does Not Involve The Issue Of Withdrawal From a Multi-Employer Collective Bargaining Agreement And Does Not Conflict With The Decisions Of This Court And The National Labor Relations Board

The question of whether or not an industry fund is either a permissive or mandatory subject of bargaining was discussed by the Eleventh Circuit. However, this Court's policy of encouraging multi-employer unit stability under *Bonanno Linen Service v. NLRB*, _____U.S._____, 102 S. Ct. 720, 723, n. 3

(1982) is not disturbed by the decision below. Since this case does not involve the question of an attempted withdrawal from an established multi-employer bargaining unit, the continuity of the established policy of this Court favoring multi-employer bargaining is not broken by the decision below. *NLRB v. Truck Drivers, Local 449 (Buffalo Linen)*, 353 U.S. 87, (1957). Likewise, the rules followed by the National Labor Relations Board (NLRB) limiting withdrawal from multi-employer units are not affected. *Retail Associates*, 120 NLRB 388 (1958).

The Eleventh Circuit's decision was based on the plain wording of the Letters of Assent. The Court concluded that the Letters of Assent specifically limited the authority of the FWCC to act as Hamilton's bargaining representative "to those matters contained in, pertaining to, or amending the 'current' labor agreement" (Pet. App. p. 6a, note 6). The NEIF provision substantially modified the labor agreements Hamilton operated under and assented to. A modified multi-employer collective bargaining agreement is not a renewal or extension of the original collective bargaining agreement. *Seymour v. Coughlin Co.*, 609 F.2d 346 (9th Cir. 1979).[7] It is well established that when one agreement incorporates the terms and conditions contained in another agreement, a party to the first agreement is not bound to matters not contained in or referred to in the second agreement. *Guerini Stone Co. v. P. J. Carlin Construction Co.*, 240 U.S. 264 (1916). This Court's holding in *Guerini Stone, supra*, has been consistently followed when interpreting contracts of every nature, including those governed by the Labor Management Relations Act. The decision below, concluding

[7] In *Seymour*, supra, the question presented was whether the employer was bound to the new, modified and amended master labor agreement on the basis of his execution of a prior short-form agreement which did not terminate. The Ninth Circuit in *Seymour*, agreeing with the District Court's decision that the employer was not bound by the modified master labor agreement, concluded that to bind the employer to future modifications and amendments of the master labor agreement regardless of whether the modifications or amendments pertain to the original agreement assented to would be to require the employer to purchase something in the blind.

that the NEIF provision would have to *pertain to* or *amend* the assented-to collective bargaining agreements before Hamilton could be bound to the provision, cited this Court's holding in *Guerini Stone Co. v. P. J. Carlin Construction Co., supra.* (Pet. App. pp. 5a-6a; note 6 at 6a). Petitioner does not cite, nor have Respondents been able to uncover, any decision adopting principles contrary to those announced in *Seymour* and *Guerini.*

The local IBEW agreements in effect from 1974 through 1978 were agreements that Hamilton was obligated to by virtue of executing Letters of Assent in 1974 and 1976 and those agreements did not contain the 1% NEIF (Res. App. 3a-23a). Any inference that the modified collective bargaining agreements with the NEIF are the same agreements which Hamilton assented to is incorrect. The first formal communication to Hamilton concerning the NEIF was through a NECA-GRAM dated October 22, 1976 which referred to the "new agreement" (Res. App. p. 24a).

Plainly, a party to an assented-to collective bargaining agreement cannot withdraw or refuse to abide by its terms and provisions. E.g., *Bonanno Linen Service v. NLRB, supra;* and *Retail Associates,* 120 NLRB 388, *supra.* Just as candidly, improper withdrawal from a collective bargaining agreement is not an issue when the agreement was never assented to. Hamilton never assented to the agreements which included the NEIF and had no reason to withdraw from the assented-to agreements. Simply, since Respondent could not have assented to provisions or agreements which fell outside of the language in the Letters of Assent, withdrawal from those provisions or agreements are not at issue. This case does not involve a party directly involved in multi-employer collective bargaining who agreed to a collective bargaining agreement containing the NEIF and then refused to abide by the provision.

The National Labor Relations Board cases cited by Petitioner stand for the principle that firms which sign a Letter of

Assent A delegate to a local Chapter of NECA authority to represent them in collective bargaining and that such firms comprise a multi-employer bargaining group.[8] Neither the National Labor Relations Board cases or the Sixth Circuit decision in *Nelson Electric Co. v. NLRB*, 638 F.2d 965 (6th Cir. 1981) addressed the issue of whether an employer could be bound to the NEIF or a collective bargaining agreement containing the NEIF by virtue of executing a Letter of Assent A.

Under the reasoning of the decision below, the local chapters of NECA are required to negotiate and adopt provisions which are related to the terms and conditions of the assented-to agreements. The decision is premised on the plain and unambiguous language of the Letters of Assent read in conjunction with the labor agreements assented to. Although collective bargaining agreements are not governed by the same common law concepts which control private contracts, the realities of collective bargaining and the interrelationship of permissive and mandatory subjects in the bargaining process do not change the intent of the parties as expressed in the four corners of the Letters of Assent. *Guerini Stone Co. v. P. J. Carlin Construction Co., supra; Roosevelt Materials Co. v. Nolan Brothers, Inc.*, 264 F.2d 807, 808-809 (10th Cir. 1959); *Lodges 743 and 1746, etc. v. United Aircraft*, 434 F.2d 422, 441 (2d Cir. 1975). Thus, despite the absence of an authoritative decision by this Court on Letters of Assent and the NEIF, the questions raised below appear settled.

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[8] *Central New Mexico Chapter, NECA*, 152 NLRB 1604 (1965) (firms signing a Letter of Assent A comprise a multi-employer bargaining group); *H.S. Brooks Electric, Inc.*, 233 NLRB 889 (1977) (signatories to Letters of Assent A constitute a unit appropriate for collective bargaining); *Nelson Electric*, 241 NLRB 545 (1979) (bargaining authority of NECA goes beyond the initial agreement assented to, however, the question of whether the NEIF or an agreement containing the NEIF went beyond the agreement assented to was not addressed); *Wayne Electric, Inc.*, 226 NLRB 409 (1976) (Letters of Assent bind signatory employer to bargaining agreements then effective and signatory employer is part of the multi-employer unit); *Northern Nevada Chapter, NECA*, 131 NLRB 550 (1961) (Letter of Assent A designates NECA as bargaining representative and signatory employer is included in the multi-employer unit).

The Eleventh Circuit decision stands for the principle that an employer cannot be bound in collective bargaining beyond that which he specifically agrees to. The distinction between mandatory and permissive subjects of bargaining was not the essence of the holding below. Petitioner's concern regarding the possibility of "mini-withdrawals" from individual provisions of multi-employer collective bargaining agreements and the "serious threat to the stability of multi-employer bargaining units" would only be justified if Hamilton had assented to the NEIF or the agreements containing the NEIF.

III

The Decision Below Does Not Raise A Conflict Between The Eleventh And Sixth Circuits

Research indicates that the only other Court of Appeals which has addressed an issue concerning the NEIF is the United States Court of Appeals for the Fourth Circuit in *NCA v. NECA*, Case Nos. 80-1808, 80-1809 wherein the Fourth Circuit on May 17, 1982 affirmed the District Court's holding that the NEIF violates the antitrust laws.[9]

Although the Sixth Circuit Court of Appeals in *Nelson Electric Co. v. NLRB*, 638 F.2d 965 (6th Cir. 1981) reviewed an NLRB decision involving a Letter of Assent A, *Nelson Electric Co.*, 241 NLRB 545 (1979), there was no mention by the Board in *Nelson* of whether or not the NEIF went beyond the scope of the language limiting the authority of the local chapter of NECA. Unlike the Eleventh Circuit decision below, the essential issue in *Nelson* did not involve the NEIF. Neither the Board or the Sixth Circuit in *Nelson* discussed the question of whether the NEIF pertained to or amended the agreement assented to by the employer on the basis of the wording in the Letter of Assent A read in conjunction with the collective bargaining agreement

[9]The NEIF will not be enforceable against any employer if the Fourth Circuit decision is sustained.

assented to. The main issues raised by the employer's arguments in *Nelson* were (1) whether the Letter of Assent A authorized the local NECA chapter to bargain collectively for the employer beyond the expiration date of the agreement assented to for jurisdictional purposes; and (2) whether the employer was only bound by the terms contained in the agreement assented to. The Board's discussion of the issues in *Nelson* is absent any reference to the NEIF:

> Since the then-current agreement expired on October 31, 1976, the argument continues, Nelson Electric did not grant any authority to NECA to bargain for it after that date, is not a member of nor a party to a multi-employer unit after that date, and does not meet the standards necessary to assert jurisdiction, since jurisdiction may be asserted only through the NECA and not Nelson Electric. Respondents directly argue that, because Nelson Electric did not authorize NECA to bargain for it collectively except for matters contained in the then-current agreement, it is not bound by the terms of any agreement after October 31, 1976 and thus had no responsibility to recognize the union after that date. Thus, as a substantive matter, Respondents argue that they did not violate the Act in the respects alleged. *Nelson Electric, supra,* 241 NLRB at 550.

The Sixth Circuit Court of Appeals decision in *Nelson* held that (1) the Board properly asserted jurisdiction over an employer who was a member of the multi employer bargaining unit represented by the union; and (2) that the new electrical contracting businesses were "alter-egos" of the old business and were therefore bound to adhere to the terms of the collective bargaining agreement which the prior business had assented to. The Sixth Circuit's discussion of the Letter of Assent A in *Nelson* is absent any mention of whether it grants plenary authority to the local chapter of NECA to the extent that an employer is bound to the NEIF or an agreement containing the NEIF:

> Nelson Electric's signing of the "Letter of Assent - A" is sufficient to subject it to the jurisdiction of the Board.

> Nelson Electric's contention that the "Letter of Assent - A" merely bound it to the terms of the collective bargaining agreement ignores the explicit language in the "Letter of Assent - A" expressly designating the NECA as Nelson Electric's collective bargaining representative. [638 F.2d at 967]

The only other reference to Letter of Assent A in *Nelson* by the Sixth Circuit was the conclusion that the employer did not timely withdraw NECA's authority to bargain under the terms of the Letter of Assent A. In the decision below, untimely withdrawal was not an issue. Hamilton had no reason to withdraw from the agreements he assented to which did not contain the NEIF (Res. App. pp. 3a-23a).

Although the decision below and Nelson involved an interpretation of the IBEW Letter of Assent A and the extent to which a party signatory to a Letter of Assent A is bound, the essential issue was not identical. *Nelson* did not address the specific language of the Letter of Assent A as it relates to the NEIF.

IV

The Decision Below Does Not Raise A Conflict Between The Eleventh And Tenth Circuits On The Ratification Issue

In the decision below, the Eleventh Circuit recognized that the collective bargaining agreements with the NEIF provision were not the same agreements which the Respondent assented to by executing the Letters of Assent in 1974 and 1976.

> Nor can appellant be held to have ratified the unauthorized NEIF provision by continuing to adhere to and enjoy the benefits of the terms of the collective bargaining agreements to which it was contractually bound as a result of previously executed Letters of Assent. (Pet. App. p. 8a).

The factual basis for the Eleventh Circuit's decision on the

ratification issue was not present in *Arco Electric Co. v. NLRB*, 618 F.2d 698 (10th Cir. 1980). The Court's conclusion on the ratification issue was based on the following facts: Hamilton notified all of the business managers of the IBEW locals on March 7, 1977 that he would not comply with the NEIF provision (Pet. App. p. 8a); Hamilton executed a Letter of Assent in April, 1977 which explicitly rejected the NEIF (Pet. App. p. 4a, note 3, 8a); and Hamilton never contributed to the Fund (Pet. App. p. 8a). The employer in *Arco, supra*, unlike Hamilton, operated under the agreement which contained the NEIF and never objected to the NEIF provision or the contract containing the NEIF provision until after the effective date of the NEIF.

> Arco complied with all the terms of this agreement until July, 1977. In June, 1977 Arco was notified of an amendment to the agreement increasing contributions to various union funds. After discussions with union officials, Arco submitted a payroll report in September, 1977, on which was written "final report". [618 F.2d 698, 699]

Unlike the facts in *Arco*, Hamilton immediately disclaimed any obligation to pay into the Fund. Immediately upon learning of the 1% NEIF through a NECA-GRAM in October, 1976, (Res. App. p. 24a), Hamilton communicated to Petitioner that he would not be bound by any agreement which included the NEIF provision. It is well settled that in order to bind contractors to industry funds or new agreements containing industry funds on the basis of ratification there must be an unequivocal and express understanding to make such payments. *Wagor v. Cal Kovens Construction Corp.*, 382 F.2d 813 (5th Cir. 1967); *Local Union No. 11, IBEW v. Jandon Electric Co.*, 429 F.2d 584 (9th Cir. 1968). Since the facts in *Arco* are contrary to the facts here, the decision below is not in conflict with *Arco*. The holding below that Hamilton did not ratify the NEIF is also consistent with the Fifth Circuit decision in *Wagor v. Cal Kovens Construction Corp., supra*, wherein the Fifth Circuit held on similar facts that the employer had not ratified an industry fund provision.

CONCLUSION

The question presented by Petitioner would be worthy of consideration if Respondent had assented to the NEIF or the collective bargaining agreements containing the NEIF. Respondent further suggests that the Court may prefer to await further development of the Fourth Circuit decision involving the NEIF. For the foregoing reasons, Respondent believes that the Court should deny the Writ of Certiorari.

Respectfully submitted,

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